IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

Union of India VS. M/s Shree Cement Ltd., Beawar.

D.B. CENTRAL EXCISE APPEAL NO.14/2006
against the order No.A/1381/04-NB/SM dated 15.9.2004 passed by Customs, Excise and Service Tax Appellate Tribunal, New Delhi.

Date of judgment : 6th Dec., 2006

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. V.K. Mathur for the appellant.
Mr. Rajendra Mehta for the respondents.

BY THE COURT: (PER HON'BLE RAJESH BALIA, J.)

Herd learned counsel for the parties.

The following question has been raised as a substantial question of law for consideration in this appeal:-

"Whether in the facts and circumstances of the case, the Tribunal was justified in allowing the modvat credit

on the tyres, tubes and flaps received by the assessee during the period 17.4.1999 to 23.7.1999 by treating them as a part of capital goods i.e. loader under Rule 57Q of the Rules, 1944 before Rule 57AA was introduced?"

The question framed at the time of admission on the basis of suggestions made by the Revenue is slightly off the mark of controversy raised in this petition as we shall presently see and needs to be re-framed.

The assessee has claimed to avail modvat credit on tyres, tubes and flaps received by him during the period 17.4.1999 to 23.7.1999 as spares / accessories of another capital goods namely loader used in the factory of the assessee in terms of Section 57Q of the Central Excise Rules, 1944.

The adjudicating authority had issued a show cause notice dated 24th April, 2001 stating that since the tyres, tubes and flaps falling under Chapter Sub-Heading No.4011.40, 4013.40 and 4012.19 of the Central Excise Tariff Act, 1985 respectively which have not been included in the list of capital goods enumerated in sub-rule (2) of Rule 57Q and, therefore, the same are ineligible for availing modvat credit. The assessee has replied that since the

assessee was not claiming the modvat credit in respect of the aforesaid goods as principal item of capital goods or inputs but only as spares or accessories of another capital goods loader which fall under chapter heading 84.29 under the Tariff Act, 1985 and, eligible for availing modvat credit. Therefore, when the principal goods are eligible for availing modvat credit, their spares and accessories are also eligible for availing modvat credit in terms of item No.5 in the schedule appended to Sub-Rule (2) of Rule 57Q.

However, the adjudicating officer held that availing of modvat credit in respect of tyres, tubes and flaps used as spares / accessories of the loader was wrong and arbitrary and the same was ordered to be withdrawn. The penalty in respect thereof was also imposed with reference to Rule 173Q.

This order of adjudicating authority dated 13.9.2001 communicated vide letter dated 14.9.2001 was reversed by the Commissioner (Appeals) pointing out that in assessee's own case the loaders have been held to be capital goods eligible for modvat credit, as aforesaid being spares and accessories of the loaders as the principal capital goods they are also eligible for modvat credit.

The aforesaid order of the Commissioner (Appeals)

was subjected to appeal before the Tribunal. The Tribunal affirmed the order of the Commissioner (Appeal) vide order under appeal.

Apparently, the question that arises for consideration is not whether the tyres, tubes and flaps in question were ineligible for modvat credit because of their receipt in factory prior to the introduction of Rule 57AA in the Rules of 1944 as appears from the question framed above, but the real question is "whether in order to avail modvat credit on any capital goods used as spares or accessories of another capital goods which are eligible for modvat credit must also fall within the specific tariff item under which such accessories or spares become eligible for modvat credit as principal capital goods" or the eligibility of modvat credit of any capital goods as spares and accessories goes along with the eligibility of the principal capital goods.

Therefore, in our opinion, the real question which arose for consideration is as under:-

> Whether in the facts and circumstances of the case, the tyres, tubes and flaps in question used by the manufacturer as spare / accessories of loaders in order to be eligible to avail modvat credit should independently fall within the tariff item prescribed

under the schedule appended to Rule 57Q for items No.1, 2, 3 and 4 or or independent tariff under which it can be subjected to duty is not relevant for the purpose of determining the eligibility to avail modvat credit in respect of any goods used as spare or accessories of another eligible capital goods?"

The table appended to Rule 57Q(1) items No.(i), (ii), (iii) and (iv) specifies the goods falling under various tariff headings which are eligible for availing modvat credit whereas item No.(v) provides that components, spares and accessories of the goods specified against item (i) to (iv) above. The item No.(v) has no further requirement that components, spares and accessories of the goods already enumerated must fall independently within the heading specified in item No.(i) to (iv). Apparently, that would have been rendering serial No.(v) itself redundant and otiose. The Tariff Act does not make distinction while prescribing rate for any item classified therein on the basis of end use of the product to which it is likely to be put. The Tariff Act primarily classifies end products to be subjected to Duty at a rate prescribed therein. This classification cannot by necessary implication be imported to operate while considering the specific exemptions, concessions or other exceptions provided on conditions specified in such notification. Such provision has to be construed in the light of

scheme of provision concerned. In contrast to provision in Tariff Act providing classification of goods manufactured and Duty payable thereon, the scheme under which modvat / cenvat credit of Duty paid on various products used in manufacture of other articles is primarily based on use to which an article or product or goods is put to it. For example when a machine is manufactured, Duty is payable on its manufacture. But credit of Duty paid on such machine can be availed by its buyer on the basis of use to which it is put. If it is used as a principal capital goods or as an accessory or spares of another machinery or as an input to be used in manufacture of another machine. Hence, where the machine purchased by it is to be used as principal instrument of manufacture, and the facility of modvat credit is not available on machines, but only on such machines falling in specified category of tariff item, it must fulfill such condition. If it is not the principal instrument of manufacturing activity but is an essential, subsidiary or supportive role to play then decisive factor becomes the role which such product play vis-a-vis principal machine in manufacturing activity. On the other hand if it is used as an input in manufacture of another article, condition of availing modvat credit is different.

Keeping in view this distinction, if we were to view

Rule 57Q it is clear that the item No.(v) in the table appended to Rule 57Q is related to use of any article as components, spares or accessories of the goods specified in item No.(i) to (iv) falling under various heads stated under item No.(i) to (iv), irrespective of its own independent classification under the Tariff Act. The eligibility of modvat credit is of any article which has been subjected to levy of duty independently depends on its end use as components, spares and accessories of goods specified against serial No.(i) to (iv) above.

Sub-rule (7) of Rule 57Q is relevant for the purpose which reads as under:-

> "(7) The credit of the specified duty on capital goods [other than above capital goods covered under S.Nos.5, 7, 10, 11 and 12 of column (2) of the Table below sub-rule (1)] and received in the factory on or after the 1st day of January, 1996, shall not be taken on a date prior to the date on which such capital goods are installed or, as the case may be, used for manufacture of excisable goods, in the factory of the manufacturer as certified by such manufacturer or a person designated by him for this purpose."

The aforesaid Rule prescribes availing of modvat

credit in respect of principal capital goods used in factory under item No.(i) to (iv), (vi), (viii) and (ix) until the same are installed or used in manufacturing. However, the restriction of availing modvat credit until its installation or user is not appended with the components, spares and accessories of the capital goods already installed in the factory. When a manufacturer receives similar type of product to be used for different purposes and the same are eligible for modvat credit on its actual user as components, spares and accessories of the eligible principal capital goods, obviously would determine subsequent user and not earlier thereto. For that reason the eligibility of the tyres, tubes and flaps used as components, spares and accessories of goods specified in item No. (i) to (iv) cannot be denied since it cannot be disputed in view of the clear entry made in para No.84.29 that loaders in question which is the principal capital goods used in manufacture of specified goods at the factory and the respondent assessee has used all articles in question as components, spares and accessories of the loaders. Hence the same are eligible for availing modvat credit in respect of the duties paid thereon. It is not disputed before us that modvat credit availed in respect of various tyres, tubes and flaps was in respect of aforesaid articles used as components, spares and accessories of loaders. In the circumstances, the question of withdrawing the modvat credit availed by the assessee in respect

thereof simply does not arise. The subsequent insertion of Rule 57AA could have made difference in respect of time as to when modvat credit of Duty paid on such principal capital goods could be availed inasmuch as under Cenvat Rules 2000 the manufacturer could avail modvat credit on principal capital goods in two installments. But it does not affect eligibility of capital goods about availing modvat credit.

We do not find any merit in this appeal. The appeal, therefore, fails and is hereby dismissed. No order as to costs.

[GOPAL KRISHAN VYAS], J. [RAJESH BALIA], J.

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